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2010 AUG -3 AM 11:35
CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY  DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LINDA M. KERR,

Plaintiff,

vs.

AMERICAN HOME MORTGAGE
SERVICING INC.,

Defendant.

CASE NO. 10-cv-1612 BEN

ORDER DENYING APPLICATION
FOR TEMPORARY RESTRAINING
ORDER AND SETTING HEARING
FOR PRELIMINARY INJUNCTION

INTRODUCTION

Before the Court is Plaintiff Linda Kerr's Petition for Temporary Injunction ("Application") filed in connection with Plaintiff's Complaint. The Application is filed *ex parte* and includes a supporting declaration from Plaintiff. Pursuant to the Application, Plaintiff requests a temporary restraining order ("TRO") enjoining Defendant from foreclosing on or taking any action with regard to Plaintiff's real property located at 10760 Esmeraldas Drive, San Diego, California. *Id.* According to the Application, and as reflected on the record, Defendant has not yet received notice of the Application or service of the Complaint. For the reasons discussed below, the Application for a temporary restraining order is DENIED.

DISCUSSION

I. TEMPORARY RESTRAINING ORDER

The "circumstances justifying the issuance of an *ex parte* order are extremely limited " because "our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and

1 an opportunity to be heard has been granted both sides of a dispute." *Reno Air Racing Ass'n v.*
 2 *McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006) (citing *Granny Goose Foods, Inc. v. Teamsters*, 415
 3 U.S. 423, (1974)(finding a TRO was improperly issued because notice to the adverse party was neither
 4 impossible nor would it render the action fruitless). Federal Rule of Civil Procedure 65 outlines the
 5 "stringent restrictions imposed" for TROs issued ex parte. *Id.*

6 The court may issue a temporary restraining order without written or oral notice to the adverse
 7 party or its attorney only if:

8 (A) specific facts in an affidavit or a verified complaint clearly
 9 show that immediate and irreparable injury, loss, or damage will result
 10 to the movant before the adverse party can be heard in opposition; and

11 (B) the movant's attorney certifies in writing any efforts made
 12 to give notice and the reasons why it should not be required.

13 Fed. R. Civ. P. 65(b)(1) (emphasis added).

14 Plaintiff has met neither requirement. The only affidavit presented to the Court providing
 15 specific facts in support of Plaintiff's motion is Plaintiff's Declaration. The Declaration does not
 16 provide specific facts that clearly show that "immediate and irreparable injury, loss, or damage" will
 17 result before Defendants can be heard in opposition. *Id.* The only possible irreparable harm reflected
 18 in the Declaration is that Defendant may foreclose on the property. However, there is no evidence of
 19 this potential foreclosure or the prospective date thereof.

20 Plaintiff has also failed to meet the second requirement of Rule 65(b)(1). Neither Plaintiff nor
 21 Plaintiff's counsel (if any) has certified in writing any efforts to give notice to Defendant or reasons
 22 why notice should not be required before a TRO is issued. Plaintiff has also not demonstrated that
 23 notice is impossible or fruitless, as required for an *ex parte* TRO. *Reno Air Racing*, 452 F.3d at 1131.

24 Plaintiff has also not provided the Court with the information necessary to issue a TRO that
 25 complies with Rule 65(b)(2). "Every temporary restraining order issued without notice must . . .
 26 describe the injury and state why it is irreparable [and] state why the order was issued without notice."
 27 Fed. R. Civ. P. 65(b)(2). As previously discussed, the only potential irreparable injury is foreclosure.
 28 However, Plaintiff has not provided the Court with information regarding this foreclosure or otherwise
 explaining why notice would be impossible or fruitless.

1 Because Plaintiff has not met any of the requirements for a TRO or provided the Court with
2 the necessary information to issue a TRO, the Application is DENIED.

3 **II. PRELIMINARY INJUNCTION**

4 Plaintiff's Application includes a request for a hearing for a Preliminary Injunction. Rule
5 65(a)(1) mandates that "[t]he court may issue a preliminary injunction only on notice to the adverse
6 party." Accordingly, to have her request for a preliminary injunction set for hearing, Plaintiff must
7 serve Defendant with all documents she has filed in this matter, including the Complaint, the
8 Application, and this Order **by August 12, 2010** and file proof of service **by August 17, 2010**.


9 If the documents are timely served and proof of service filed, the request for a preliminary
10 injunction will be set for hearing **on September 27, 2010**. Briefing shall comply with Civil Local
11 Rule 7.1. If all documents filed in this matter are not served as directed, the matter will not be heard
12 on September 27, 2010. Rather, Plaintiff must obtain the next available hearing date from chambers
13 that complies with the requirement of Civil Local Rule 7.1.

14 **CONCLUSION**

15 Plaintiff's Application for a TRO is **DENIED**.

16 **IT IS SO ORDERED.**

17 DATED: August 2, 2010


Hon. Roger T. Benitez
United States District Judge